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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINALD BRIMMER,

Defendant and Appellant.

D075533

(Super. Ct. No. RIF1604660)

APPEAL from a judgment of the Superior Court of Riverside County, Jorge Hernandez, Judge. Judgment of conviction affirmed; sentence vacated and remanded for resentencing.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

After attacking his girlfriend, I.B., with a knife, a jury convicted Reginald Brimmer of inflicting corporal injury on a spouse or cohabitant (Pen. Code, § 273.5, subd. (a);¹ count 2), assault with a deadly weapon (§ 245, subd. (a)(1); count 3), and violating a protective order (§ 166, subd. (c)(4); count 4). The jury found true allegations that, in the commission of the offense under circumstances involving domestic violence, Brimmer personally inflicted great bodily injury (§§ 12022.7, subd. (e), 1192.7, subd. (c)(8)), that he personally used a deadly and dangerous weapon, a knife (§ 12022, subd. (b)(1)) and that his violation of the restraining order involved an act of violence (§ 166, subd. (c)(4)). In a bifurcated trial, the court found true allegations that Brimmer had two serious felony prior offenses and three prior strike offenses. Brimmer received an indeterminate term of 25 years to life and a determinate term of 15 years.

Brimmer appeals, contending that the trial court abused its discretion when it denied his motion to withdraw his jury waiver for his prior offenses. He also claims that insufficient evidence supports the trial court's true finding regarding one of his prior strike offenses. We reject these contentions.

Brimmer claims that he received an unauthorized sentence on count 4. The People concede the error and we agree. Finally, the parties agree that the matter must be remanded to allow the trial court to exercise its discretion to strike his five-year prior serious felony enhancements. We agree that the matter must be remanded.

¹ Undesignated statutory references are to the Penal Code.

GENERAL FACTUAL BACKGROUND

Background

In 1997, Brimmer and I.B. started a romantic relationship and had a son in 2000. In 2001, Brimmer choked I.B. to unconsciousness. After I.B.'s release from the hospital, Brimmer threatened her with a knife. From 2001 to 2012, I.B. and Brimmer did not see each other, but continued a relationship by mail and phone. In 2012, they resumed a physical relationship, but they broke up in 2014. Thereafter, Brimmer harassed I.B. In 2015, I.B. obtained a three-year restraining order protecting her and her son.

In August 2016, Brimmer appeared at the shelter where I.B. and her son were living. I.B. reported the incident to the police. Brimmer was later convicted of violating the restraining order, and the court issued a 10-year restraining order.

The Knife Attack

On a day in September 2016, Brimmer approached I.B. at a library. He pushed I.B. out of her chair and onto the floor. Brimmer held her to the floor, pulled out a large kitchen knife, and tried to stab her, eventually cutting her forehead. I.B. was able to escape after a library patron struck Brimmer with a chair. I.B. received stitches for the forehead laceration and suffered nerve damage and loss of feeling on her scalp. The jury viewed security video of the incident.

DISCUSSION

I. *MOTION TO WITHDRAW JURY WAIVER ON PRIOR OFFENSES*

A. *Additional Background*

Before trial, defense counsel conferred with Brimmer and informed the court that Brimmer would waive a jury trial on his prior conviction allegations. The court then addressed Brimmer, informing him that he had "an absolute right" to have a jury decide his prior conviction allegations and inquired if he understood this right and was willing to give up that right. Brimmer responded affirmatively to both questions.

During his testimony, Brimmer admitted that, as a result of his actions in 2001, he pleaded guilty to making criminal threats and assault with a deadly weapon. The jury later rendered its verdict and the trial court dismissed the jury. A month later, Brimmer filed a motion to withdraw his waiver of a jury trial on the prior offenses, arguing that the prosecution would not be prejudiced "because the picking of a jury will likely only take one day, and will not substantially delay the prosecution's case or interfere with the testimony of any witnesses." The court denied the motion, finding that the original waiver was made intelligently, after consultation with counsel, and it would be a waste of judicial resources to impanel a jury for a half hour of testimony where Brimmer admitted two of the strike priors during his testimony.

B. *Analysis*

Brimmer asserts that the trial court abused its discretion when denying his motion to withdraw the waiver of a jury trial on his prior conviction allegations because he did

not admit one of the prior crime allegations in his testimony and was not collaterally estopped by his trial testimony to deny the other prior crimes allegations in a priors trial. He also notes that the prosecution had not yet filed a witness list and could have easily brought in a person from their identity unit.

Although a defendant in a criminal prosecution has a right to a trial by jury under both the state and federal Constitutions (*People v. Weaver* (2012) 53 Cal.4th 1056, 1071), the right to a jury trial on the issue of prior convictions is limited. Section 1025 provides that "the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty" but "the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury." (§ 1025, subds. (b) & (c).)

Once a constitutional right to jury trial has been validly waived, the waiver cannot be withdrawn except in the discretion of the trial court. (*People v. Chambers* (1972) 7 Cal.3d 666, 670 (*Chambers*).) "Absent special circumstances the court may deny a motion to withdraw such a waiver especially where adverse consequences will flow from the defendant's change of mind." (*Ibid.*) In exercising its discretion the court may consider "the timeliness of the motion to withdraw the waiver, the reason for the requested withdrawal and the possibility that undue delay of the trial or inconvenience to witnesses would result from granting the motion." (*Id.* at pp. 670-671.)²

² In *Chambers, supra*, 7 Cal.3d 666, the defendant waived his right to a jury on his prior conviction allegations on the first day of trial, but attempted to withdraw his waiver later the same day, before trial started "stating only that defendant's brother opposed a court trial. The court denied the motion and proceeded to trial." (*Id.* at p. 670.) The

Brimmer did not present any special circumstances justifying a grant of his motion. In fact, Brimmer provided no reason for his request and instead argued that granting the motion would not prejudice the prosecution. If we were to accept Brimmer's argument and conclude that the trial court abused its discretion in this case, then defendants would to be permitted to withdraw a jury waiver, for no reason, assuming they could show that the prosecution would not be prejudiced. *Chambers, supra*, 7 Cal.3d 666, does not support any such result. Rather, in *Chambers* our high court indicated that the defendant bears the burden of justifying the withdrawal of a jury waiver, and absent "special circumstances," an untimely motion can be denied for that reason alone. (*Id.* at pp. 670, 671.)

Here, Brimmer brought his motion a month after the court had discharged the jury. The untimeliness of the motion, standing alone, justified its denial. Additionally, Brimmer did not bear his burden of justifying the withdrawal of a jury waiver. Moreover, the court was ready to go forward with a bench trial on the prior convictions when it heard the motion. Selecting a jury would have caused a one- or two-day delay and possibly interfered with the orderly administration of the court's business. We

Supreme Court concluded that the trial court's denial of this motion was not an abuse of discretion, stating "the motion to withdraw the waiver was not timely. Neither are there special circumstances which would compel the court to grant the motion notwithstanding delay of the trial, inconvenience to the witnesses and potential prejudice to the People. Little or no weight should be given to the unexplained wish of defendant's brother for a jury trial. The denial of the motion to withdraw the jury trial waiver under these circumstances was clearly not an abuse of discretion." (*Id.* at p. 671.)

conclude that the trial court did not abuse its discretion in denying Brimmer's motion to withdraw his jury trial waiver.

II. *SUFFICIENT EVIDENCE SUPPORTS TRUE FINDING ON PRIOR CONVICTION*

A. *Legal Principles*

To qualify as a strike, a prior conviction must be a " 'violent felony' " listed in section 667.5, subdivision (c), or a " 'serious felony' " listed in section 1192.7, subdivision (c). (§§ 667, subd. (d) & 1170.12, subd. (b).) The first amended information alleged that Brimmer's 2003 conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) qualified as a strike prior conviction. At the time of Brimmer's plea to assault, the statute could be violated by committing assault either with a "deadly weapon" or "by any means of force likely to produce great bodily injury." (Former § 245, subd. (a)(1).) For an assault to qualify as a " 'serious felony,' " (§ 1192.7, subd. (c)) and thus qualify as a strike offense, defendant must personally use a deadly or dangerous weapon (*id.*, subd. (c)(23)) or commit an assault with a deadly weapon (*id.*, subd. (c)(31)). For an assault to qualify as a " 'violent felony,' " (§ 667.5, subd. (c)) and thus qualify as a strike offense, defendant must inflict "great bodily injury . . . which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9" (*Id.*, subd. (c)(8).)

"The prosecution has the burden of proving beyond a reasonable doubt each element of a prior conviction used to enhance a defendant's sentence." (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128.) "A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison" (*People v. Delgado* (2008) 43

Cal.4th 1059, 1066 (*Delgado*).) "[I]f the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred.

[Citations.] [¶] However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense." In determining whether the trial court properly found that defendant's prior conviction qualifies as a serious felony and a strike, "we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*Id.* at p. 1067.)

B. *Analysis*

Brimmer contends that the People introduced insufficient evidence to prove that his prior conviction for assault qualified as either a serious felony or a violent felony. Specifically, he claims that the evidence shed no light on whether he committed the assault by using a " 'deadly weapon' " or " 'by any means of force likely to produce great bodily injury' " and that the trial court resorted to judicial factfinding to make this determination. We disagree.

In *People v. Gallardo* (2017) 4 Cal.5th 120, our high court held "that a court considering whether to impose an increased sentence based on a prior qualifying

conviction may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*Id.* at p. 136, fn. omitted.) The *Gallardo* court held the trial court had engaged in "an impermissible inquiry to determine" the factual basis for the defendant's prior plea by relying on the preliminary hearing transcript, since "the relevant facts were neither found by a jury nor admitted by defendant when entering her guilty plea" and could not serve as the basis for the defendant's increased sentence. (*Id.* at p. 137.)

Here, the trial court had before it the accusatory pleading (information) and plea form from the prior case. The information charged Brimmer with assault "with a deadly weapon other than a firearm, to wit: KNIFE, *and* by means of force likely to produce great bodily injury." (Italics added.) The plea form shows a "plea to court" and does not include a factual basis for the plea. The court concluded that these documents show that Brimmer personally used a knife to commit the assault because (1) the information specifies a knife (not another weapon), and (2) the information uses "and as opposed to or" meaning that Brimmer used a knife and force likely to produce great bodily injury.

As a threshold matter, the use of "and" in the information is insufficient to draw the conclusion that Brimmer both used a knife and used force likely to produce great bodily injury. While this is one possible meaning, it is equally possible that the use of "and" in the information was simply "a shorthand description of the criminal conduct covered by section 245, subdivision (a)(1)—assault by means of force likely to produce great bodily injury *or* with a deadly weapon." (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 606 (*Banuelos*)). Thus, in this respect, the information is ambiguous.

For an assault to qualify as a " 'violent felony,' " and thus be a strike offense, defendant must inflict "great bodily injury . . . which has been charged and proved as provided for in section 12022.7, 12022.8, or 12022.9" (§ 667.5, subd. (c)(8)). The materials before the trial court do not show Brimmer inflicted great bodily injury because the necessary enhancement was not charged. However, an assault may qualify as a "serious felony," and thus be a strike offense, if defendant personally used a deadly or dangerous weapon (§ 1192.7, subd. (c)(23)) or committed an assault with a deadly weapon (*id.*, subd. (c)(31)). The materials before the trial court do not show Brimmer personally used a deadly or dangerous weapon because a defendant can aid or abet an assault with a deadly weapon. (See *People v. Medina* (2009) 46 Cal.4th 913, 921-923.) Additionally, assault by means of force likely to produce great bodily injury is not a serious felony absent the additional element of personal infliction of great bodily injury. (*Delgado, supra*, 43 Cal.4th at p. 1065.) Accordingly, the question becomes whether substantial evidence existed showing that Brimmer was convicted not only of violating

former section 245, subdivision (a)(1), but of doing so by committing assault with a deadly weapon (§ 1192.7, subd. (c)(31)) so as to qualify the offense as a serious felony.

Although the information specifies that Brimmer used a knife to commit the assault, when viewed alone, the information is ambiguous. The package submitted to the trial court, however, contained another piece of evidence not addressed by the parties; namely, the abstract of judgment. The abstract of judgment shows a violation of "PC245(A)(1)" and, next to this, lists the crime as "assault w/weapon." Thus, the materials before the trial court were similar to those presented in *Delgado*.

In *Delgado, supra*, 43 Cal.4th 1059, like in this case, the prosecution introduced into evidence an abstract of judgment. An abstract of judgment is a "statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence." (*Id.* at p. 1070.) The abstract in *Delgado* described a conviction of violating section 245, subdivision (a)(1), as an " 'Asslt w DWpn.' " (*Delgado*, at p. 1064.) The court found the evidence to be a reliable official record sufficient to support a finding that the conviction was for the serious felony of assault with a deadly weapon. (*Id.* at pp. 1069-1070.)³ Similarly here, the abstract of judgment indicated that Brimmer committed the assault

³ The *Delgado* court distinguished *Banuelos, supra*, 130 Cal.App.4th 601. In *Banuelos*, the court reversed the enhancement because the abstract of judgment indicated both great bodily injury and use of a deadly weapon. (*Id.* at p. 606.) The *Delgado* court explained that unlike the evidence in *Banuelos*, "the instant abstract does not mention the other specific, discrete, and disjunctive form of section 245[, subdivision](a)(1) violation, involving force likely to produce [great bodily injury]." (*Delgado, supra*, 43 Cal.4th at p. 1069.)

with a deadly weapon ("PC245(A)(1)" "assault w/weapon") and did not mention great bodily injury. Following *Delgado*, we affirm the court's true finding.

III. ILLEGAL SENTENCE ON COUNT 4

The jury convicted Brimmer of violating a protective order (§ 166, subd. (c)(4)). On this count, the trial court imposed a 25-year-to-life sentence under the "Three Strikes" law but stayed imposition of the sentence under section 654. Brimmer contends, and the People agree, that the sentence for count 4 is unauthorized because violating a protective order is not a serious or violent felony.

Violating a protective order is punishable by imprisonment in county jail for up to one year or state prison for 16 months, two years, or three years. (§ 166, subd. (c)(4).) This crime is not a strike offense because it is not a serious felony as defined in section 1192.7, subdivision (c), or a violent felony as defined in section 667.5, subdivision (c). Because violating a protective order is not a serious or violent felony, Brimmer's sentence of 25 years to life is unauthorized. (*People v. Anderson* (2010) 50 Cal.4th 19, 26 [An unauthorized sentence is one that " 'could not lawfully be imposed under any circumstance in the particular case.' "].)⁴ Additionally, the prosecution did not plead and prove a disqualifying factor, as required for imposition of a three-strike sentence. (§ 1170.12, subd. (c)(2)(C)(iii).) Accordingly, we vacate the sentence imposed on count four and remand the matter for resentencing.

⁴ Although Brimmer did not raise this sentencing issue in the trial court, an unauthorized sentence " 'constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal.' " (*People v. Anderson, supra*, 50 Cal.4th at p. 26.)

IV. *PRIOR SERIOUS FELONY ENHANCEMENTS*

The trial court imposed a consecutive five-year term on each of the two prior serious felony convictions that it found true. At the time of sentencing, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018, the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, amended section 1385, subdivision (b), to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

The People concede, and we agree, that Senate Bill No. 1393 applies retroactively to Brimmer's judgment, which was not yet final as of January 1, 2019. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745 [absent evidence of contrary legislative intent, the Legislature intends statutes reducing the penalty for a crime or providing the trial court discretion to do so to apply retroactively to all cases not final when the statutes take effect].) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a), enhancements imposed on Brimmer. (See *Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3 [Remanding for resentencing when "[t]he record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant."].) We express no opinion about how the court should exercise its discretion.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for resentencing consistent with the views expressed in this opinion. A new abstract of judgment shall be prepared after resentencing and forwarded to the Department of Corrections and Rehabilitation.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.